WEINER BRODSKY SIDMAN KIDER PC

224891

April 14, 2009

BY HAND

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

RE. STB Finance Docket No. 35229, Pacific Harbor Line, Inc. – Petition for Declaratory Order

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of the Response to Los Angeles Harbor Grain Terminal's Reply to Pacific Harbor Line, Inc.'s Petition for Declaratory Order.

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,

Rose-Michele Nardi

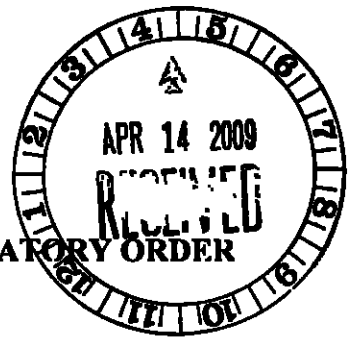
ENTERED
Office of Proceedings
APR 14 2009
Part of
Public Record

Enclosures

cc: Andrew Fox (by e-mail)

224891

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB FINANCE DOCKET NO. 35229

PACIFIC HARBOR LINE, INC. – PETITION FOR DECLARATORY ORDER

This filing is in response to the April 1, 2009, Reply by Los Angeles Harbor Grain Terminal ("LAHGT") to the Petition for Declaratory Order ("Petition"), filed with the Surface Transportation Board (the "Board") on March 12, 2009, by Pacific Harbor Line, Inc. ("PHL"). The Reply by LAHGT asserts certain principles of law that are outside the narrow scope of PHL's initial Petition However, LAHGT's characterization of such legal principles highlights both the potential liability of LAHGT for the outstanding storage charges described in the Petition, as well as the general confusion that currently exists with respect to this area of the law. Accordingly, PHL hereby clarifies and expands the scope of its Petition.

ENTERED
Office of Proceedings
APR 14 2009
Part of
Public Record

1. The Board Should Rule On Whether A Party Is A Consignee *By Virtue Of* Its Appearance On The Bills Of Lading And/Or Waybills

In its Reply, LAHGT claims that whether it "is a consignee or an agent is a matter already settled by law and is not appropriate for a declaratory order proceeding." Reply at 1. *See also* Reply at 3. That statement is inaccurate, as evidenced by the very case that LAHGT attaches in support of its Reply. *See Norfolk Southern Railway Co. v. Brampton Enterprises, LLC*, 2008 WL 4298478 (S.D. Ga. 2008) ("*Brampton*"). In *Brampton*, the issue was whether a party could be made a consignee by a unilateral third party action. The court stated "[t]here are no binding decisions on this issue in the

Eleventh Circuit, *and other courts have issued conflicting decisions* (Emphasis added). *Id* at *2.

The *Brampton* court concluded that a party could not "be made a consignee by the unilateral action of a third party, particularly where [that party] was not given notice of the unilateral designation in the bills of lading." *Id.* However, in direct conflict with the *Brampton* holding, the Third Circuit previously ruled that, under certain circumstances, the designation of a party as the sole consignee on the bill of lading was sufficient to render such party "presumptively liable" for transportation-related charges. *See CSX Transportation Company v. Novolog Bucks County*, 502 F.3d. 247, 250, 262 (3rd Circ. 2007) ("*Novolog*").

Both the *Brampton* and *Novolog* courts appear to agree that the liability for transportation-related charges of a consignee that acts as an agent is governed by the ICC Termination Act of 1996, under 49 U.S.C. § 10743(a)(1). However, these two courts disagree on the applicability of this statutory provision to a party that is identified as consignee on a bill of lading by the unilateral action of a third party. Accordingly, there is a clear conflict in the case law regarding the correct application of a statutory provision under the Board's jurisdiction, and PHL hereby requests that the Board resolve this issue. Specifically, the Board should address whether a transloader, such as LAHGT, may become a consignee liable for the storage charges it accrues, if that party is the only entity named on the bills of lading and/or waybills as such.

PHL believes that its waybill data[1] identifies only LAHGT as the consignee for the vast majority of the relevant car shipments.[2] If LAHGT is a consignee and is acting

[1] As the non-originating carrier for traffic to LAHGT, PHL does not generate the bills of lading, and it does not receive them in the ordinary course of business

as an agent for the rail cars on which storage charges accrued, then LAHGT is potentially directly responsible for those charges. Accordingly, the issue of LAHGT's consignee status is directly related to whether LAHGT is responsible for the storage charges it accrued.[3]

2. If An Agent Is Not A Consignee or Consignor, Then The Board Should Address Whether The Agent Has Any Notice Obligations To The Railroad.

In its Reply, LAHGT asserts that "PHL knows or reasonably should know the identity and contact information of the consignor and consignee," based on LAHGT's belief that "PHL is provided all the carriage documentation by its rail partners on or before the time PHL interchanges the train cars from said carriers." Reply at 8. However, as noted above, the issue at the heart of the dispute between LAHGT and PHL is not whether PHL has access to the names of the consignee or consignor, but whether PHL is entitled to rely on that information. LAHGT's assertion that PHL could obtain the relevant consignee or consignor information from the carriage documentation directly contradicts LAHGT's theory of non-liability.

LAHGT's position appears to be that an agent named as a consignee or consignor on the bill of lading and/or waybill is not liable for transportation-related charges, because such a designation was made unilaterally by a third party. Under this theory of liability, the fact that PHL may be able to obtain the consignor and consignee information

---

[2] In these cases, LAHGT is characterized either as the consignee only or as both the consignee and the "in care of party."

[3] LAHGT asserts in its Reply, without reference to any supporting documentation, that it is an agent of the consignor rather than the consignee. *See* Reply at 2. As noted above, this assertion contradicts the waybill data in PHL's possession. If the Board concludes that LAHGT was not a consignee with respect to the applicable carloads, then the Board should determine if LAHGT was a consignor, and whether LAHGT had any disclosure obligations. *See Novolog* at 263 (noting that "[a]lthough consignor liability is not regulated by 49 U.S.C. § 10743 or an analogous statutory provision, we see no reason why the principles applicable to consignee liability under the statute should not be made equally applicable to consignor liability", but noting "[n]onetheless, we find the record insufficient and the briefing too cursory to announce a rule").

in the bill of lading or waybill is largely irrelevant, because the party identified as the consignor or consignee in those documents are not necessarily the party liable for the transportation-related charges. In other words, LAHGT appears to be arguing that PHL is not entitled to rely on the designation of LAHGT as consignee in the bills of lading and/or waybill.

If the Board were to agree with LAHGT on this issue, non-consignee agents necessarily must have some responsibility to disclose the identity of their principals and the principal's relevant contact information (or at a minimum, to timely forward invoices for which the principal was liable). Otherwise, the Board's application of 49 USC §10743 could prevent a railroad from enforcing its lawful tariff charges. For example, if the Board were to find that a transloader such as LAHGT is not a consignee, despite being so identified on the applicable bills of lading and/or the waybills, and another entity is not identified as consignee on such documentation, then no railroad in the transportation chain would know the identity of the "true" consignee(s) (*i.e.*, presumably the entity(ies) that receive the cargo after it is unloaded by the transloader). In that situation, only the transloader/agent would have the necessary information to identify the parties to whom it provided the transloaded cargo. Without that information, PHL would not know the identity of the consignees from which to seek payment of the tariff charges.

3. Discovery Is Appropriate In This Proceeding.

Based on the expanded scope of its Petition, PHL agrees with LAHGT that some discovery may be appropriate to determine LAHGT's status as a consignee or consignor. However, PHL believes that 120 days for discovery, as well as 60 days for preparation of

an Opening Statement and Reply, is excessive Accordingly, PHL proposes the following procedural schedule:

Day 1: Board institutes a declaratory order proceeding that includes a discovery period of 45 days.

Day 75 Petitioner's Opening Statement is due

Day 105: Respondent's Reply Statement is due

Day 125: Petitioner's Rebuttal Statement is due

Respectfully submitted,

Mark H. Sidman
Rose-Michele Nardi
Weiner Brodsky Sidman Kider PC
1300 19th Street NW
Fifth Floor
Washington DC 20036-1609
Attorneys for Pacific Harbor Line, Inc

Dated: April 14, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Pacific Harbor Line, Inc. – Petition for Declaratory Order was served on April 14, 2009, by first-class mail, postage pre-paid, on the following:

Deidre Von Rock-Ricci, Esq.
Ellis Ross Anderson, Esq.
Anderson & Poole, P.C.
601 California Street
Suite 1300
San Francisco, CA 94106-2618

Rose-Michele Nardi, Esq.